

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIA E. RODRIGUEZ

Claimant

VS.

FARMLAND FOODS, INC.

Respondent

AND

ACE AMERICAN INSURANCE CO.

Insurance Carrier

Docket No. 1,034,496

ORDER

Claimant requested review of the June 26, 2007, preliminary hearing Order entered by Administrative Law Judge John D. Clark. John L. Carmichael, of Wichita, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent and its insurance carrier.

The Administrative Law Judge (ALJ) found the opinion of Dr. David Hufford that claimant's foot problems were not a workers compensation issue to be more persuasive than Dr. Pedro Murati's opinion that all claimant's diagnoses, including her foot problems, were a direct result of her work at respondent. Accordingly, the ALJ denied claimant's request for medical treatment for the problems with her feet.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 26, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's determination that claimant failed to prove accidental injury to her feet arising out of and in the course of her employment and the ALJ's resultant denial of medical treatment and temporary total compensation if claimant is taken off work by the treating physician.

Respondent argues the ALJ's decision turned upon the credibility of the witnesses and that the ALJ apparently did not find claimant's testimony to be so persuasive as to carry her burden of proof in the face of an opposing medical opinion. Respondent asserts the Board frequently gives deference to an ALJ's findings and conclusions as to credibility and requests that the Board do so here and affirm the Order of the ALJ.

The issue for the Board's review is: Are claimant's foot problems the result of personal injury by accident that arose out of and in the course of her employment with respondent?

FINDINGS OF FACT

In her Application for Hearing, claimant alleged she suffered injuries to her bilateral feet as a result of prolonged standing at work beginning "January 1, 2006 and each and every working day thereafter."¹ However, at the preliminary hearing, her attorney orally amended that claim to allege a starting date of "about June of 2005."²

Claimant is 56 years old and has worked for respondent for 7 years, all of which has been on the production floor. The production floor is cement, and it is wet and cold because respondent processes meat there. Claimant works an 8-hour day with a 15 minute break and a 30 minute lunch. The rest of the time she is standing while working on the production floor. She does not stand for long periods of time anywhere except at work. She does nothing outside of work that cause her feet to hurt.

About two years ago, claimant began noticing pain in her feet. It started out as minor but gradually worsened, and now the pain does not go away. Both her feet are very stiff and the pain goes up as high as the area behind her knees.

On March 6, 2007, claimant saw Dr. David Hufford for an assessment of her low back pain. While she was with Dr. Hufford, she mentioned to him that she had pain in her right foot. She did not mention her left foot because the right foot was hurting the most. She states that Dr. Hufford did not examine either of her feet that day. Dr. Hufford's medical report dated March 6, 2007, indicated:

In addition [claimant] inquired about right foot pain. Is tender at anterior calcaneus consistent with plantar fasciitis. I recommended heel cups. This is not a worker's compensation issue but I felt this was a simple and relatively effective, low cost intervention she could try.³

¹ Form K-WC E-1 Application for Hearing filed May 3, 2007.

² P.H. Trans. at 4.

³ P.H. Trans., Resp. Ex. 1.

On March 28, 2007, claimant was seen by Dr. Pedro Murati at the request of her attorney. Dr. Murati evaluated claimant for a number of problems, including the problems she was having with her bilateral feet. Upon examination of claimant's feet, Dr. Murati found she had tender Achilles bursa bilaterally and tender heels bilaterally. He diagnosed her with bilateral Achilles bursitis and advanced DJD of the left subtalar joint. Dr. Murati found that all of claimant's current diagnoses were within a reasonable medical probability a direct result of her work from a series of injuries that occurred in June 2005 and every working day thereafter. Dr. Murati stated that claimant needed to stop working at the meat packing plant and if that was not done, any treatment recommendations for her work-related injuries would be a waste of time and money. He recommended that claimant apply for Social Security disability benefits.

Claimant continues to work at respondent. Although she is on light duty, apparently because of other injuries, she said she is still standing all day at work. She wears tennis shoes at work but at home she generally wears shoes with low heels. Respondent's attorney noted claimant was wearing shoes with a heel at the preliminary hearing. Since about January of this year, because of the pain, claimant has worn a special kind of tennis shoes at work, with springs that cushion her feet.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁴ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁵

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which

⁴ K.S.A. 2006 Supp. 44-501(a).

⁵ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

the accident occurred and means the injury happened while the worker was at work in the employer's service.⁶

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁸

ANALYSIS AND CONCLUSION

Claimant describes her job with respondent as requiring her to stand on a hard, cold concrete floor all day every day. Except for her two breaks, she cannot sit and rest her feet. She relates her foot pain to work because that is where her pain started and because she does no prolonged standing on hard surfaces when she is not at work.

Dr. Murati took a history from claimant about her working conditions and onset of symptoms, and he performed an examination of claimant. Dr. Hufford did not, but he nevertheless diagnosed plantar fasciitis. Dr. Murati made a diagnosis of bilateral Achilles bursitis and advanced degenerative joint disease of the left subtalar joint. Claimant was sent to Dr. Hufford for work-related injuries other than her feet. As Dr. Hufford was neither asked to render a causation opinion concerning claimant's foot pain nor to treat claimant's feet, it may be that he was simply noting in his report that claimant mentioned foot pain to him but that this was not part of what he was seeing claimant for under workers compensation so it "is not a worker's compensation issue"⁹ It is not clear that Dr. Hufford was giving an opinion that claimant's condition was not caused or aggravated by her work. Therefore, based upon the record compiled to date, the greater weight of the evidence is that claimant's foot problems are work related.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated June 26, 2007, is reversed and remanded for further orders consistent herewith.

IT IS SO ORDERED.

⁶ *Id.* at 278.

⁷ K.S.A. 44-534a.

⁸ K.S.A. 2006 Supp. 44-555c(k).

⁹ P.H. Trans., Resp. Ex. 1.

Dated this _____ day of August, 2007.

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge